

IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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The Miller Rubber Company, The  
Miller Rubber Company of Cali-  
fornia, corporations,

*Appellants,*

*vs.*

Citizens Trust and Savings Bank,  
a corporation, as Trustee of the  
Estate of W. D. Newerf, doing  
business as W. D. Newerf Rub-  
ber Company, Bankrupt,

*Appellee.*

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Reply Brief of Appellee and Brief of Cross-Appellant  
Citizens Trust and Savings Bank, Trustee.

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On March 19, 1915, an involuntary petition in bank-  
ruptcy was filed against W. D. Newerf, doing busi-  
ness as W. D. Newerf Rubber Company, and the Cit-  
izens Trust & Savings Bank was appointed receiver  
of his estate, and after adjudication, was duly elected  
trustee of said estate. Immediately upon the receiver's  
taking charge, The Miller Rubber Company, and The

Miller Rubber Company of California, filed a petition in reclamation, claiming to be the owners of certain automobile tires and accessories in the possession of the receiver. The controversy was by the court referred to Honorable Lynn Helm, referee in bankruptcy in and for Los Angeles county as special master, and the issues raised by the amended petition [Fols. 8 and 9], and the answer of the receiver [Fols. 10 and 11], and the stipulation relative to the allegations of the amended petition entered into in open court, were tried before him.

On the hearing it developed that The Miller Rubber Company of Ohio and the bankrupt had entered into a contract on November 6, 1911 [Fols. 80-83], and that at the time of the filing of the petition in bankruptcy herein, certain of the goods shipped to bankrupt under said contract, and consisting of automobile tires and accessories were still on hand. It also appeared that The Miller Rubber Company of California and the bankrupt had entered into a contract which was to take effect as of July 1, 1914 [Fols. 84-93], and that certain of the goods shipped under said contract and also consisting of automobile tires and accessories were on hand. It also developed that there was a controversy between the bankrupt and The Miller Rubber Company of California as to the method of computing the compensation of W. D. Newerf under the contract of July 1, 1914. The result was that the special master ordered an accounting by the Mushet Audit Company, and also ordered that all goods shipped under the 1914 contract be at

once delivered to The Miller Rubber Company of California. This was done, and automobile tires and accessories to the amount of approximately \$50,000 were delivered.

The audit showed that there were on hand at the time of the filing of the petition in bankruptcy goods shipped under the 1911 contract to the amount of \$7,685.23, and the special master found that under the law these goods became part of the bankrupt estate, and passed to the trustee. The Miller Rubber Company and The Miller Rubber Company of California filed exceptions to the special master's report.

The special master also found that there was due to the bankrupt from The Miller Rubber Company of California on account of commissions the sum of \$4495.25. He therefore recommended to the court that judgment go against The Miller Rubber Company of Ohio for the possession of the goods on hand shipped under the contract of November 6, 1911, to the amount of \$7,685.23 and against The Miller Rubber Company of California for unpaid commissions amounting to \$4495.25. He also assessed the costs amounting to \$1407.34 against the petitioners.

The Miller Rubber Company and The Miller Rubber Company of California filed exceptions to the special master's report, and the matter was argued orally before the Honorable Robert S. Bean, judge of the District Court of the United States, sitting in the Southern district of California, Southern division. The court affirmed the report of the special master as to the title to the merchandise, but overruled said re-

port as to the commissions. He also divided the costs equally between the petitioners and the trustee.

The Miller Rubber Company and The Miller Rubber Company of California perfected an appeal to this court from that part of the decision of the District Court awarding the goods to the trustee; and the trustee, Citizens Trust & Savings Bank, filed a cross appeal from that part of the decision overruling the special master's report as to the commissions amounting to \$4495.25.

Both parties have prepared assignments of error; those of The Miller Rubber Company and The Miller Rubber Company of California will be found set out in their brief on file herein. The assignments of error of the Citizens Trust and Savings Bank, trustee, are hereinafter set forth.

#### **ASSIGNMENTS OF ERROR.**

Comes now Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, bankrupt, respondent for the reclamation of certain goods, wares and merchandise in the hands of the said trustee, and petitioner on appeal to the United States Circuit Court of Appeals for the Ninth circuit, from the order and final decree of the above entitled District Court, made and entered November 22nd, 1915, and reversing the decree and order of the special master declaring that said trustee is entitled to recover from The Miller Rubber Company of California, or its bondsman, the sum of forty-four

hundred ninety-five and 25/100 dollars (\$4495.25), the amount of commissions found by said special master to be still due bankrupt from said Miller Rubber Company of California, and herewith makes the following assignments of error:

(1) The said District Court erred in its finding, decision and judgment under the evidence and the law that there was not due and owing to said trustee from The Miller Rubber Company of California the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), or any other sum, as commissions still due bankrupt from The Miller Rubber Company of California, against which there was no offset whatsoever.

(2) The said District Court erred, failing to find as a matter of law under the evidence that the actual selling price of goods sold by W. D. Newerf, agent of The Miller Rubber Company of California, under the contract of June 11th, 1914, was the amount at which said merchandise was billed, whether or not the customer purchasing said goods took advantage of the five per cent (5%) discount offered for cash.

(3) The said District Court erred in its finding, decision and judgment that the actual selling price of the goods sold by W. D. Newerf, agent of The Miller Rubber Company of California, under the contract of June 11th, 1914, where goods were sold for cash, was the invoice price of said goods less the five per cent (5%) allowed for cash.

Wherefore, said respondent for reclamation prays that the order of final decree and judgment of said District Court reversing the finding of the special master herein that the said trustee in bankruptcy is entitled to recover from The Miller Rubber Company of California, or its bondman, the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), the amount of commissions still due bankrupt from The Miller Rubber Company of California, against which there is no offset whatsoever, be reversed, and that the said District Court may by mandate, be directed to enter a final order and decree to the effect that the Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, do have and recover of and from The Miller Rubber Company of California, a corporation, or its bondsman, American Surety Company, a corporation, the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred.

The argument on the cross-appeal of the Citizens Trust and Savings Bank, trustee, will be first taken up; and afterwards that in reply to the brief of The Miller Rubber Company and The Miller Rubber Company of California.

#### BRIEF OF APPELLANT.

An agreement was entered into between The Miller Rubber Company of California and W. D. Newerf

[Fols. 84 to 91, inclusive], and a supplemental agreement was also entered into bearing the same date [Fols. 92 and 93], by the terms of which agreement and supplemental agreement, The Miller Rubber Company of California *employed* Newerf to sell its product in certain designated territory.

In said agreement it was provided [Fols. 85 and 86] that:

“The party of the second part (Newerf) shall make sales from said stock of casings and tubes to responsible parties at prices lower than 10—12½ trade discount and 5% additional for cash from the 1914 price list of The Miller Rubber Company of Akron, Ohio, a copy of which is hereto attached, marked Exhibit A and made a part hereof, and dated as effective December 1st, 1913, subject to changes in said list and discounts as hereinafter set forth (and sales of other products at such prices as may be agreed upon from time to time) and make collections from all sales, and deposit the funds from said sales in such depository in Los Angeles and San Francisco as the party of the first part (The Miller Rubber Company of California) may select, *such funds to be deposited in the name of and to the credit of The Miller Rubber Company of California, subject to the check of the treasurer or duly authorized officer of The Miller Rubber Company of California,* and said second party shall make a statement of said bank account to the party of the first part on the first day of each and every month, commencing August 1st, 1914.

“All sales from consigned stock shall be made *in the name of The Miller Rubber Company of California,* and shall be on *terms* of not to exceed thirty (30) days net except in such cases as may otherwise be

mutually agreed upon in writing by said parties and except as hereinafter provided.

“Party of the second part (Newerf) shall receive in full payment *for his services* as such agent and in full payment of all salaries, rent, hire, and other expenses incurred by him, the difference between the price or prices at which goods are actually sold by said party of the second part and the price of 10-12½-12½-5% from The Miller Rubber Company’s 1914 price list effective December 1st, 1913.”

From the above it will be noted that, under the 1914 contract, Newerf ceased to be anything more than a *hired employee* of The Miller Rubber Company of California.

[Folio 38]: “A price list was furnished by The Miller Rubber Company to W. D. Newerf and by The Miller Rubber Company of California to W. D. Newerf, agent, under the contract of June 11, 1914, which states, after giving the prices at which tires are to be sold, ‘Terms 5% cash ten days.’”

Therefore, it will be noted that not only was W. D. Newerf the *hired employee* of The Miller Rubber Company of California, but he was *directed* by his employer (The Miller Rubber Company of California) to allow customers a *cash discount of five per cent*.

Newerf’s compensation under said contract was the difference between the amount for which the goods were actually sold and 10-12½-12½-5% from the list price. That is to say: If goods were listed at \$100.00, Newerf was charged with the difference between said \$100.00, and said \$100.00 less 10-12½-12½-5%, which amounted, approximately to 65%.

In other words, if goods were listed at \$100.00 and were sold at \$100.00, Newerf received as his compensation approximately \$35.00.

After the parties had been operating for some little time, The Miller Rubber Company raised a question as to this five per cent discount, which is referred to in the contract heretofore quoted [Fol. 38]; they claiming that where goods were sold for \$100.00, the provision in the invoice placed there *at the direction of The Miller Rubber Company of California*, to the effect that customers might have five per cent cash discount; if the customer should pay his bill within the limit stipulated, and receive the five per cent discount; the price at which the goods were *actually sold* was \$95.00, and that Newerf's compensation, instead of being \$35.00, should be \$30.00. Between the time when this contract of June 11, 1914, went into operation and the time of the filing of the petition in bankruptcy herein, this difference of five per cent had amounted to \$4495.25, and this money was in the hands of The Miller Rubber Company of California; because from the time the contract of June, 1914, was entered into, all money from tire and accessory sales was appropriated by The Miller Rubber Company of California.

Finding 11 of the special master [Fols. 74, 75 and 76 of the transcript] deals with this point. The special master found that the *invoice price* to the customers was the *actual selling price*, and that Newerf was entitled to his compensation on that basis, without any deduction on account of the customers' hav-

ing paid for their goods in cash. The District Court reversed this ruling; and it is from this judgment and order of the District Court that the trustee prosecutes this appeal. [Fols. 9, 10 and 11 of the Transcript on Appeal of the Citizens Trust and Savings Bank, pages 170, 171 and 172 of the Transcript.]

Newerf testified [Fol. 24, page 29]:

"My interpretation of the contract with The Miller Rubber Company of California was to the effect that the computation of the compensation was to be at the time of the contract being made, 10-12½-12½-5% from the list attached to the contract, and that the difference between the sale price of a tire or tube and those figures was to be our compensation, and our conclusion of the sale price was the *face of the invoice*. If a tire sold at \$20.00, it is 10-12½-12½-5% from the list price or from the price list attached to the contract. Our compensation should be the difference between the original price stipulated in the contract and the face of the invoice. The five per cent appearing on the invoice as terms was a matter, we concluded, of *The Miller Rubber Company's* making, and that that was simply *an inducement for the customer to pay cash* on that invoice at a stipulated time and should not enter into our compensation.

"The forms of invoices were furnished by *The Miller Rubber Company of California*.

"There was no reference to the five per cent except in the place on the invoice where it said 'terms.' It said five per cent 10th prox. We considered that that was allowed by *The Miller Rubber Company of California*.

"There was a period of time that there was no objections made by *The Miller Rubber Company* to our

method of figuring and I was then figuring, as I have indicated, on a sale for \$100.00." [Folio 25.]

Charles R. Wetsel, witness and credit manager for The Miller Rubber Company of California, testified [Fol. 32, p. 36]:

"The main purpose of giving the five per cent is to aid in the collection of accounts, to get the money in quicker, that is the only reason that the five per cent is given, to get collections in."

This is a case of first impression. There are no decisions dealing with the subject; and, as has been seen, the two learned judges to whom this matter has been submitted have taken opposite views of it. Yet it seems that there should be no difficulty in arriving at a correct conclusion on this point.

Newerf was furnished with a price list at which he was directed to sell. He had nothing to do with the making of prices; he had nothing to do with the allowance or refusal of this item of five per cent; *that was provided for and inserted in the price lists, and on the invoices by The Miller Rubber Company of California*, as an inducement to customers to pay cash.

These accounts did not belong to W. D. Newerf; the money did not belong to W. D. Newerf; he simply turned in a report of his sales and was to receive his compensation on his report.

If Newerf sold a bill of goods at \$100.00, how can it be said that the actual selling price of those goods was less than the amount marked on the invoice; because, forsooth, the customer chose to take advantage of the opportunity given him, *not by Newerf but by*

*The Miller Rubber Company of California*, his employer, to save himself \$5.00 by making prompt payment of his bill. And how can it be said that the selling price which, at one time, to-wit, at the time the goods were sold, was \$100.00, should be changed after the sale, and at any time before the 10th of the next month to \$95.00, at the caprice, not of *Newerf*, nor of *The Miller Rubber Company of California*, but of the customer? It seems to us that this is an absurd conclusion and that the attitude of *The Miller Company of California*, evidenced by the testimony of Chas. R. Wetsel [Fols. 31 and 32] is too absurd to warrant serious consideration by the court; and was simply an effort on the part of *The Miller Rubber Company of California* to take advantage of the situation in which it found *Newerf*, for the furtherance of its own ends, and those of the parent company, *the Miller Rubber Company*.

On pages 66 and 67 of the brief of *The Miller Rubber Company* and *The Miller Rubber Company of California*, on file herein, will be found the argument on the appeal with regard to these commissions; in which they attempt to show that there was a subsequent agreement between *The Miller Rubber Company of California* and *Newerf*, by which *Newerf* agreed to the way of thinking of *The Miller Rubber Company of California*. This is not the case.

*The Miller Rubber Company of California* wrote to *Newerf* under the name of *The Miller Rubber Company of California* at Los Angeles [Fol. 54], complaining of *Newerf's* way of figuring these com-

missions; and Newerf relied [Fol. 55], setting forth his views, which are in accord with the views taken by the trustee and by the special master.

There was no agreement with regard to these commissions; The Miller Rubber Company had Newerf's money, and Newerf had no way of enforcing payment of his commissions except by a cancellation of the contract; and, inasmuch as he was indebted over forty thousand dollars to the kindred company, The Miller Rubber Company, the parent company, he was in the position of a man who has a pistol at his head and a hand in his pocket. Fortunately, the trustee occupies a different position.

It is contended by The Miller Rubber Company and The Miller Rubber Company of California that the commissions of W. D. Newerf were applied to the indebtedness of said Newerf to The Miller Rubber Company of Ohio, under authorization from Newerf; and that therefore no judgment will lie for the balance of these commissions, against The Miller Rubber Company of California. This contention is based on the day letter of W. D. Newerf to The Miller Rubber Company, Akron, Ohio, dated November 12, 1914 [page 32, folio 27], which telegram reads as follows:

“New notes mailed per your request. Agreeable to apply our commissions on open account. Return us the notes for which we have sent renewal. Writing.”

This telegram was part of the correspondence between Newerf and The Miller Rubber Company relative to the application of these commissions, and it will

be seen from the transcript that separate authorizations were obtained for each application of these commissions.

In a letter of The Miller Rubber Company, found on page 54 of the transcript, it is stated:

“August check for commissions as \$3173.02 and with July commissions will be applied by us on notes 15th.”

No authority for any application of commissions was given subsequent to November, 1914, and as the telegram shows, it applies to commissions previously earned and a settlement made at that time; and does not in any way refer to commissions to be earned in the future. Under the circumstances The Miller Rubber Company of Ohio had no right to apply any commissions earned after the first of November, 1914, to the payment of its account. Furthermore, this amount of \$4495.25 is an amount which never was applied, because it is claimed by The Miller Rubber Company of California *not to be owing* to Newerf; and said amount is now owing from The Miller Rubber Company of California to the trustee of this estate.

It is respectfully submitted that the decision of the Hon. Robert S. Bean [Folio 115], wherein he refused to allow Newerf the amount deducted by The Miller Rubber Company of California, to-wit, the sum of four thousand four hundred and ninety-five and 25/100 dollars (\$4495.25), should be reversed and judgment entered in favor of the trustee and against The Miller Rubber Company of California for said

sum of four thousand four hundred and ninety-five and 25/100 dollars (\$4495.25).

**Reply Brief of the Appellee, Citizens Trust and Savings Bank, Trustee in Bankruptcy of the Estate of W. D. Newerf, Bankrupt.**

This appeal is prosecuted by the appellants from a decision of the Hon. Robert S. Bean, judge of the District Court sitting in Los Angeles, confirming the report of the Hon. Lynn Helm, special master, with regard to the title to certain automobile tires and accessories which were delivered to W. D. Newerf, bankrupt, by The Miller Rubber Company of Akron, Ohio, under and by virtue of a certain contract dated November 6, 1911, between The Miller Rubber Company and the Prudential Rubber Company, both of Akron, Ohio, both corporations existing under the laws of the state of Ohio, and W. D. Newerf Rubber Company of Los Angeles; which goods were found in the possession of said bankrupt when the receiver took charge; and which goods, according to the report of the special master, are of the invoice value of seven thousand six hundred and eighty-five and 23/100 dollars (\$7685.23). This contract appears in folios 80 to 83, inclusive, and an examination of this contract will be interesting and instructive. The principal points in this contract are as follows:

1. The Miller Rubber Company agreed to furnish Newerf a stock of goods on consignment;
2. The goods were to remain the property of the consignor until sold;
3. Newerf had the option of giving four-months

notes up to twenty-five thousand dollars (\$25,000.00) to cover his indebtedness;

4. There is no stipulation to the effect that the consignor shall dictate the price at which goods shall be sold;

5. There is no agreement that the goods shall be kept segregated from the other goods in Newerf's stock;

6. There is no agreement to the effect that the accounts and bills receivable resulting from the sales on credit shall belong to the consignor.

As a matter of fact, the testimony shows [Folio 23, p. 28] that Newerf had full charge of the selling of the Miller goods in his store; that there was no representative of The Miller Rubber Company in his establishment; that he did not consult The Miller Rubber Company with regard to what credit he should extend nor with regard to what goods he should sub-consign; that he had no sign in his store to indicate to the general public that anything was the property of The Miller Rubber Company; that the consigned merchandise was mingled with other goods in his store.

This is also confirmed in the testimony of John F. Roe [Folios 28 and 29]:

"A stranger coming to the room or coming into the store could not distinguish part of the stock from the other except that part was tires and accessories and the other part was the shipping room.

"No stranger coming in would notice any difference. There was nothing to indicate that the goods belonged to anybody except the W. D. Newerf Rubber Company."

Also, the testimony of Charles R. Wetsel, credit manager of The Miller Rubber Company [Folio 32, p. 36]:

"It is optional with the agent as to what he sells goods for. He does not even have to use our list. *He could charge twice the prices if he wanted to.*"

In other words, under the 1911 contract, (1) Newerf mingled the consignor's goods with his own so that they could not be distinguished therefrom; (2) sold them at his own prices and upon his own terms; (3) the money and accounts and bills receivable resulting from the sales belonged to him and *did not belong to the consignor*, but were covered by notes, which the contract shows were to amount to as much as twenty-five thousand dollars (\$25,000.00).

These elements, we contend, stamp the 1911 contract as a fraud upon the creditors; and it is urged that this court should affirm the judgment of the District Court, which confirmed the report of the special master holding that the goods delivered under the 1911 contract and found in the stock at the time of the bankruptcy, belonged to the estate and not to The Miller Rubber Company.

This is a question of vast importance to the commercial interests of this country; because, if a manufacturer or a wholesaler can ship his goods to a retailer, to be used during prosperous times to all intents and purposes as if they were the retailer's own goods; and then, when adversity overtakes the retailer, can reclaim his goods, there is no protection for the other creditors.

That ample protection can be afforded the wholesaler or manufacturer is very clearly demonstrated by the action of the parties in the agreement of June 11, 1914, under which contract The Miller Rubber Company of California (1) employed Mr. Newerf [Folio 84]; (2) controlled the selling price [Folio 86]; (3) controlled the proceeds [Folio 86]; (4) controlled the terms [Folio 86]; (5) required that all sales should be made in the name of The Miller Rubber Company of California [Folio 86].

The special master and the District Court very properly held that the balance of the goods on hand shipped under the 1914 contract (which amounted to over fifty thousand dollars) should be by the receiver delivered to The Miller Rubber Company of California. [Folio 71, p. 79.]

It will therefore be seen that this case presents to the court an excellent opportunity for finally settling the law with regard to these two classes of contracts; and laying down a plain rule for business men to follow; so they can amply protect themselves if they so desire in the title of their goods, and still give protection to other creditors furnishing goods to the same debtors.

There are two distinct lines of cases cited by the courts of this country on this point; and while there has been more or less confusion, on account of the varied nature of the different transactions, it will be found that almost invariably where the elements exist which are to be found in the 1911 contract, the title to the goods on hand has been held to belong to the

bankrupt estate. And that where the elements of the 1914 contract predominate, the courts have held that the goods should be turned over to the consignor.

The cases in bankruptcy state that, where possible, the laws of the state in which the controversy arises, should be looked to for a rule to govern the decisions of the bankrupt courts. Under the laws of the state of California, conditional sale contracts are valid; but the cases in which they have been held to be valid, have been cases in which the property to be consigned was not for sale or consumption by the vendee:

- 155 Cal. 459, automobile;
- 36 Cal. 151, four mules, harness and one wagon;
- 41 Cal. 455, piano;
- 53 Cal. 597, furniture;
- 100 Cal. 408, horses;
- 123 Cal. 474, printing press;
- 30 Cal. 407, steam boiler, etc.;
- 30 Cal. 407, steam boiler, etc.;
- 163 Cal. 256, automobile;
- 158 Cal. 302, automobile;
- 72 Cal. 293, *Palmer v. Howard*.

In the last cited case, the Supreme Court of the state of California stated as follows:

“It is settled in this state that even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale, get no valid claims to the property. (*Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 598.) But in applying this rule, it must be re-

membered in general that *the policy of the law is against upholding secret liens and charges to the injury of innocent persons or encumbrancers for value*, and, in particular, that mortgages of personal property are permitted only in certain specified cases and then only upon the observance of certain formalities designed to insure good faith and to give notice to the world of the character of the transaction. These provisions as to mortgages cannot be evaded by any mere shuffling of words where it is clear from the whole transaction that for all practical purposes, the ownership of the property was intended to be transferred and that the seller only intended to reserve a security for the price. Any characterization of the transaction by the parties or any mere denial of its legal effect will not be regarded. The question, it is true, is one of intention but the intention must be collected from the whole transaction and not from any particular feature of it."

Turning now to the cases which appellant has cited in support of its contention, we desire to take these cases up in order and show their distinguishing features.

1. Met. Natl. Bank v. Benedict, 74 Fed. 182, decided in 1896:

"The S. Company made a written contract with the B. Company whereby it agreed to realize for consignment all ready-made clothing of B. Company, net prices as per memorandum, etc. Shortly afterwards the S. Company made a bill of sale of all its stock to the M. Bank, expressly excepting from the operation of such bill of sale goods held

by the S. Company on consignment for others. At the time of the making of such bill of sale, the S. Company notified the bank that the goods received from the B. Company were held on consignment and separated such goods from others in its warehouse, but the bank took said goods and converted them to its use; whereupon, the B. Company sued for their value. Held: That the contract between the S. Company and the B. Company was not a sale but a contract of factorage which passed no title to the S. Company which could be transferred by bill of sale.”

Thus it will be noted that there was no question here of the rights of creditors or of the trustee in bankruptcy. The bank simply stood in the shoes of the S. Company. This case throws absolutely no light on the controversy.

2. *In re Columbus Buggy Co.*, 142 Fed. 859, decided in 1906. In this case the Circuit Court of Appeal for the Eighth circuit held that the trustee stood in the shoes of the bankrupt: this was prior to the 1910 amendment.

3. *Dunlop v. Mercer*, 156 Fed. 545, decided in 1907. The fourth syllabus states as follows:

“The failure to record a contract of conditional sale renders it voidable by attachment creditors, judgment creditors and *bona fide* purchasers only in Minnesota and where there were no such creditors and purchasers when the petition in bankruptcy was filed, such failure did not render it voidable by the trustee because he had no better

title in the absence of fraud than the vendee and his creditors had at the filing of the petition."

This case was decided prior to the 1910 amendment and shows on its face that it was decided on the theory that the trustee stood in the shoes of the bankrupt.

4. *In re Pierce*, 157 Fed. 757, decided by the Eighth Circuit Court of Appeals in 1907.

In this case it is held that the trustee had no greater right than the bankrupt.

5. *Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, decided by the Eighth Circuit Court of Appeals in 1909.

This case holds that the trustee had no greater right than the bankrupt. It also shows the following facts:

The property was insured in the name of the consignor; sales were to be settled for in cash or customer's notes, the notes to be made on blanks furnished by the consignor and the notes to be delivered to the consignor. The consignee had no ownership in the proceeds. The contract states: "All proceeds of the sales shall remain vested in the consignor." The court said:

"The contract before us is not a contract in which the consignee can sell at any price or on any terms he chooses."

6. *In re Gray*, 170 Fed. 638, District Court of Oklahoma, 1908. In this case there was no question of the rights of creditors holding a lien by legal or equitable process because it was decided before the

amendment of 1910, and the only question before the court was that of recordation under the Oklahoma law.

7. *In re Bailey*, 176 Fed. 628, District Court of ~~South Carolina~~ California, decided February 4, 1910, before the 1910 amendment. The court said:

"The referee found as a matter of fact that the paints and painters' supplies were furnished under a contract of consignment; that same was not recorded and that the claims represented by the creditors who have filed this petition for review *have not been reduced to liens.*"

It was held that:

"Petitioners could reclaim their goods under the statute of South ~~California~~ which provides, 'every agreement between the vendor and vendee, bailor and bailee, of personal property whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors of purchasers for a valuable consideration without notice unless the same is reduced to writing and recorded in the manner required by law for recording agreements.'

"The trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it subject to all equities impressed upon it in the hands of the bankrupt."

8. *In re Smith*, 192 Fed. 574, District Court of Maryland, 1911. The contract in this case provides:

"The fertilizers and all proceeds of any sale of the same made by such agent are to be the prop-

erty of the said Baltimore Pulverizing Company and to be held by said agent in trust for said Baltimore Pulverizing Company until the said proceeds of sale shall have been paid over to the said company and until any and all notes given for the sale of said fertilizer, either by the said agent or said purchasers, shall have been paid and satisfied.

"All bills to purchasers were marked 'Mr. James H. Smith, Agent of Baltimore Pulverizing Co., in account with said company.' "

"In this case the contract and shipments were proven and nothing else. No course of dealing was proven between the parties more consistent with their considering themselves buyer and seller than agent and principal. Bankruptcy followed hard after the making of the contract. When the petition was filed no remittance had ever been made by the bankrupt; none had become due. In this state of the proof, the company is entitled to the proceeds of its fertilizer in the hands of the trustee, unless, as a matter of law, such contract, as it made with the bankrupt, must always as against an execution creditor of the so-called agent, be held to be a sale; *such contracts may readily be abused.*"

The court held that the character of the transaction will depend upon what the parties did and not what name they gave to what they did.

9. *In re Farmers Co-operative Co.*, 202 Fed. 1005, District Court of North Dakota.

This was under a statute of the state of North Da-

kota relative to the recordation of contracts and no question of the resale of the property was involved.

10. Wood M. & R. v. Vanstory, 171 Fed. 375, Circuit Court of Appeal, Fourth circuit, 1909.

The points in this case are these: The machines were not charged to the bankrupt nor invoiced as part of its stock. The property was capable of easy identification, that is to say, it was not mingled with the other goods of the bankrupt. The consignor paid storage to consignee. The court held that the contract was primarily one of storage. The consignee could purchase from the storage stock. In this case it was held that the trustee had only the rights of the bankrupt. This case refers to Wood v. Eubank, 169 Fed. 929, where it is held

“A bankrupt’s trustee occupies the same relation to the creditor that the bankrupt sustained prior to the date of the adjudication.”

11. Foreman v. Drake, 98 N. C. 311. In this case there was no agreement to resell. It was simply a lease contract for sale of household goods.

12. L. C. Smith Co. v. Alleman, 199 Fed. 1. In this case there was no provision for a resale. It was simply an ordinary lease contract for the sale of a typewriter.

13. *In re Reynolds*, 203 Fed. 162, District Court, Eastern district of Kentucky, 1912. In this case the goods were insured by the consignor at its expense. The entire proceeds of the sale were the sole property

of the consignor and it was agreed that they should be kept separate by the agent and apart from his other funds.

14. *Berry Bros. v. Snowden*, 209 Fed. 336, Ninth circuit. In this case the consignor paid the freight, cartage and insurance. The consignor had the right to withdraw goods from storage at will. This case holds that it is different in its facts from the case of *Penny v. Anderson*, 176 Fed. 141.

15. *In re Killian Mfg. Co.*, 209 Fed. 498. In this case the goods or the proceeds were held in trust for the consignor until the price was paid.

16. *In re Grand Union Co.*, 219 Fed. 353. This case has nothing to do with the consignment of goods for resale but is a case involving the question as to whether the petitioner had bought certain piano leases or simply loaned money on them as security.

17. *General Electric Co. v. Brower*, 221 Fed. 597, decided by the Ninth Circuit Court of Appeal. In this case the proceeds were held for the benefit of the consignor. The consignor could compel the return of the goods at any time. The agent was compelled to sell at prices and on terms fixed by the consignor. On all bills and invoices for lamps sold by the agent, the following words appeared:

“Agent for Banner Incandescent Lamps of General Electric Co.”

The agent's books and records were always open to the consignor. The boxes containing the lamps were marked "Banner Electric Co."

18. *In re National Home & Hotel Supply Co.*, 226 Fed. 840, District Court of Michigan. In this case it is held that no test can be applied and that each case must be separately construed. At the same time under the facts in this case, we are of the opinion that the learned District Court erred in awarding the goods to the consignor and that the decision should have been with the trustee in bankruptcy.

19. *Ludvigh v. American Woolen Co.*, 231 U. S. 522. In this case the title was to pass direct from consignor to purchaser. Consignor had his sign on the door. Consignee agreed to collect for the consignor. The consignor had a bookkeeper in consignee's store. Consignee was not permitted to keep the proceeds of the sale or use them for its own use.

It will thus be seen that there is not a single case cited by appellant, with the exception of the case of the National Home & Hotel Supply Company (which, by the way, is a District Court case and is not governing in this court), which cannot readily be distinguished from the case at bar.

In all these cases, except those which are decided under the old law and holding that the trustee stands in the shoes of the bankrupt, certain distinguishing features appear, that is to say:

(1) There is a segregation of the consigned goods from the other goods of the consignee;

(2) The goods are sold in the name of the consignor;

(3) The consignee obtains no title to the proceeds, but holds them in trust for the consignor;

(4) The sales prices are dictated by the consignor.

These were the distinguishing features of the case of the General Electric Company v. Brower, *supra*, decided by this court about a year ago.

#### Cases for Appellee.

Turning now to the cases upon which appellee relies to support its contention, we first find the case of *In re Gracewick*, 115 Fed. 87, 8 A. B. R. 149, decided by the United States Circuit Court of Appeals, Second circuit, April 22, 1902, in which case it was held:

“Where goods were sold to the bankrupt upon credit and upon the understanding that the title to such of them as should not be sold by him should remain in the vendor until payment of the purchase price, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee. The title to the goods vested absolutely in the buyer and passes to his trustee in bankruptcy under section 70-a, the nature of which is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another.”

This was a petition for a review of an order of the District Court as a court of bankruptcy, directing the trustee to return to the United Shirt & Collar Company certain goods, wares and merchandise claimed by

the company to belong to it and claimed by the trustee to be part of the bankrupt's estate. The case arose in New York. The court said:

"It is settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent and until the performance, the title does not vest in the buyer. \* \* \* But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable and the title to have vested absolutely in the buyer."

*In re Miller & Brown*, 135 Fed. 868, 14 A. B. R. 439, U. S. District Court, Eastern District of Pa., March, 1905:

Mr. Brown, of the bankrupt firm, desiring to obtain an assortment of carpets and rugs or art squares, called at the mill of the Magee Carpet Co., the petitioner, and selected certain carpets, and had same shipped upon the understanding that what the firm sold should be paid for and what they did not, should be returned. Claim was made against the trustee in bankruptcy for the unsold portion. The court held:

"Where the transaction between the bankrupt and another in regard to certain carpets and rugs constitute nothing more than what is known in

law as a contract of sale and return, the title to the unsold portion of the goods so consigned on hand at the date of adjudication, passes to the trustee in bankruptcy."

*In re Wells*, 140 Fed. 752 (15 A. B. R. 419), District Court Middle District of Pa., November, 1905. In this case the court said:

"There is no particular magic in the terms 'consign' or 'consigned account.' The question is, What was the inherent character of the transaction which depends upon the purpose of it? Were the goods put into the hands of one party by the other to be sold for him and on his account, creating the relation of principal and factor, or were they turned over to such party to be treated and disposed of as his own, being responsible to the other simply for the price? In the one case we have a trust or bailment, the goods being those of the consignor or principal, as well as all moneys received for them. In the other there is a sale, the superadded condition sometimes appearing, that the title shall not pass until the goods are paid for, amounting to nothing as a restriction upon it."

The court quotes 24 Am. & Eng. Ency. of Law, 2nd Ed., 1026, where it is said:

"In case of goods consigned to be sold for the consignor, who is to regulate the price and terms of sale, the factor is the agent and the contract one of bailment, and this is so though the consignment is made on a *del credere* commission. If, however, the consignee or factor is to sell upon terms fixed by himself and is bound to pay

to the consignor a fixed price, the contract is one of sale."

In this case it was agreed that goods should be consigned instead of being sold in the regular way. It was provided that the consignee should take an inventory of those goods which she had on hand that should be charged to her consignment account. She was to report monthly the amount she had on hand, and the sales which she had made, paying for the latter the regular wholesale prices at which the goods were billed to her. It was urged by the consignor that the money received from the sales should be kept separate, but this was not done. It was stipulated that the goods should remain the property of the consignor and that it should be at liberty at any time to come and take them. The court said:

"Were the goods sent to Mrs. Wells by the Silk Company to be sold on their account, she merely acting as their factor or agent in disposing of them; or in making sales, did she act for and on her own account, realizing what she could and being answerable to them only for the wholesale price? It seems to me that there can be but one answer to this inquiry. \* \* \* As to all the goods covered by the so-called consignment account on hand at the time or subsequently sent her, it is clear that they were dealt in and disposed of by Mrs. Wells as her own. Upon their receipt, they were mingled with her other stock and not kept separate as would be expected in the case of commission goods, although it is possible that they could have been identified by the tags upon them

if it became necessary, as could, however, other things in the store, with little doubt. But more than this, they would be invoiced and charged to her by the Silk Company at definite prices and *sold by her on her own account at such figures and to such parties as she saw fit*, over which the Silk Company had no control, except as they might have taken away the handling of their goods if she cut their memorandum retail price. \* \* \* But *the money received was not to be kept separate* and the only purpose of the provision that *she should make monthly reports* was apparently in order to keep track of her sales and thereby fix the amount for which she was to account. Nor does it add any particular strength to the case that the goods were to remain the property of the Silk Company until paid for. This was an unnecessary stipulation if the transaction was in reality a bailment, and raises the suspicion that in resorting to it the claimants had their doubts. At most, it was an attempted condition by which the better to secure the price enforceable no doubt between the parties even to the extent of retaking the goods, but worthless as to creditors and so of no avail here."

Penny & Anderson, 23 A. B. R. 115, 176 Fed. 141, U. S. District Court, Southern District of New York.

Penny and Anderson became bankrupt and a receiver was appointed. The receiver made an inventory of the stock on the premises, which included a quantity of wines and liquors found in the cellar and known as the property of McCunn & Co. These goods were not in any way separated from the other wines

and liquors stored in the wine cellar, but were used as required in the restaurant upstairs. McCunn & Company filed a petition, claiming title to certain wines and liquors in the receiver's possession and produced an agreement by which McCunn & Company agreed to stock the wine cellar of Penny & Anderson with certain wines and liquors on consignment, the title to said wines and liquors to remain in McCunn & Company until the full indebtedness of Penny & Anderson to McCunn Company had been paid in full. No payments were ever made on these goods and the petitioner asked that they be returned as consigned or for their full value. The referee recommended to the court that the petition be dismissed for the reason that the inherent character of the attempted consignment was a sale of goods for consumption with the *secret restriction* that title should not pass until the goods were paid for, which is inconsistent with the continued ownership of the vendor and fraudulent and void as against creditors of the bankrupt. The court said:

“The debtors were permitted to sell and dispose of the goods as they saw fit at any price and terms for consumption on the terms as required in their business. The agreement is silent as to the disposition of the proceeds of the sale but recognizes an indebtedness on the part of Penny & Anderson to be paid before the title vest in them. \* \* \* *The vice in the whole transaction lies in the fact that the goods were delivered for consumption or sale in a way inconsistent with continued ownership of the vendor and therefore constituted a fraud upon the vendee's creditors.*”

*In re* Harrington, 32 A. B. R. 828, 212 Fed. 542. This is a case practically on all-fours with the case at bar. The petitioner, Flanders Motor Company, of Detroit, Michigan, granted to the bankrupts the sale of Everitt automobiles in all the New England states except Connecticut, and agreed to sell said automobiles to dealers at certain specified discounts from the catalogue prices. The fifth clause of the contract provides that "the dealer shall on orders for parts be allowed 30% discount from the last list price established by the manufacturer." The ninth clause provides that "It is expressly understood and agreed that the title to each and every automobile and to all automobile parts furnished to said dealer under the terms of this agreement shall not pass to the dealer until the same is fully paid for in full and cash."

The court said on page 544:

"The rights of the parties depend upon the real and complete agreement between the claimant's purchaser and the bankrupts. The court is not limited to the mere language of the written instrument; it may examine all facts concerning the matter and determine whether the written contract was made in good faith or was merely colorable and if made in good faith, and whether its provisions for the retention of title were waived by the vendor.

"It is apparent that neither the claimant nor the dealer understood or believed, either at the time when the written contract was made or subsequently, that its terms were to be lived up to, and those stringent provisions in regard to the retention of title were inserted not for the pur-

pose of every day business, but *only in an effort to safeguard the rights of the vendor in case the dealer should fail.* The parties plainly contemplated that the parts in question were to be taken and kept by the bankrupts in order that they might be promptly accessible for repairs upon Everitt automobiles in the dealer's territory, and that as such parts should be needed for repairs, the bankrupt should sell and deliver them to the persons upon whose automobiles the parts were used.

"It is absurd to suppose that the claimant can now replevy from the various persons whose Everitt cars were repaired by the bankrupts, the parts used in such repairs, although by the literal terms of the contract of June 28, 1911, the claimant would have that right. *Both parties to the contract understand that it did not mean what it said* and that the dealer did have the right to sell and dispose of parts in the ordinary course of business. It is to be observed that *the vendor made no reservation of its right to the proceeds of such sales; no provision as to the insurance upon the parts; no prohibition against mingling the parts with other goods or proceeds of the sales with other money of the dealer.* The actual agreement between the claimant and the bankrupt is to be gathered not from a single clause of the written contract but from the complete understanding between the parties. The formal reservation of title in the written instrument is contradicted and nullified by the unwritten parts of the agreement and the written contract is *pro tanto* merely colorable. \* \* \*

"The case is, of course, to be determined according to the law of Massachusetts under which

special interests in personal property are strongly protected. At the same time it seems to me that ‘the real purposes and understanding of the parties to the contract were to make an effectual sale, and that the writing, if not interpreted to withhold the title by its terms, was merely a convenient resort to provide the right to take the goods in event of disaster overtaking the concern.’ Day, J., in *Ludvigh v. American Woolen Co.*, 231 U. S. 522.”

*In re Flanders v. Reed*, Circuit Court of Appeals, First Circuit, Feb., 1915, 33 A. B. R. 842, 220 Fed. 642, confirming *In re Hartington*, 32 A. B. R. 828. The A. B. R. syllabus reads as follows:

“A vendor of automobile parts in the possession of a bankrupt at the time of his bankruptcy cannot reclaim them under the contract providing that the title shall remain in the vendor until payment in full, but containing no provisions preventing the bankrupt from treating the parts as his own and selling them in the ordinary course of business and applying the proceeds to his own use, which he did, with the knowledge and without the objection of the vendor. Such a contract is fraudulent as to creditors.”

*John Deere Plow Co. v. Leon D. Mowry, trustee*, U. S. Circuit Court of Appeals, Sixth Circuit, May 1915, 32 A. B. R. 384, 222 Fed., page 1.

“The whole controversy turns upon whether the contract between the Dere Company, manufacturer, and Miller Brothers, retail dealers, was one of conditional sale, so that the title did not pass out of the manufacturer so long as the goods re-

mained unsold by Miller Brothers, or was one of absolute sale, whereby the title did pass, accompanied by a pledge or lien given back to the seller to secure the purchase price. If the former, the contract was not by any applicable statute required or permitted to be recorded, and the reservation of title is good as against the trustee. If the latter, the contract amounts to a chattel mortgage, and under the June, 1910, amendment of section 47a of the Bankrupt Act, it is invalid as against the trustee because not filed. \* \* \* In one class may be put articles like machinery, somewhat permanently installed, intended for use by the vendee and not intended for resale by him. These cases present no inherent difficulty in sustaining the vendor's reserved title as fully as the seemingly very liberal policy of the state (Michigan) in this respect may justify. There is in the contract or in the surrounding conditions nothing inconsistent with the expressed reservation of title, and so nothing to interfere with its naturally full effect. In the other class are the cases where it is clear either by expressed words or by necessary implication that both parties intended the vendee should resell the property to others and should give to such second purchaser a perfect title. Here at once we have an inconsistency. How can the vendee sell that which he does not own? It goes without saying that if there are in the contract inconsistent provisions, some of which indicate that the title was served and some that the title vested, the dominant thought must be ascertained and given effect regardless of any formal contrary statement. By a review of the Michigan cases and the principles which must control, we

are led to the conclusion that the reservation of title can be sustained (as a conditional sale) as against a declared right of resale only on the theory that the resale is made by the vendee as the agent or consignee of the vendor by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the condition which then for the first time vests title in him. \* \* \* Our general view \* \* \* is to the effect that where goods are intended for resale, the reservation of title cannot stand (as a conditional sale) unless taking the entire contract and circumstances together it is clearly dominant over the right of resale and the other inconsistent features of the contract. In other words, the facts as a whole must be consistent with the theory that the resale is made by the vendee as agent or consignee and not as owner, \* \* \* or where intent of the parties is to be drawn from the value of the contract and from the joint effect of all the conditions."

In this case it was held that the title passed to the vendee accompanied by a pledge of lien to the vendor to secure the purchase price, constituting a chattel mortgage invalid as against the trustee of the vendee because not filed for record.

*In re Agnew*, 23 A. B. R. 360, 178 Fed. 478. In this case District Judge Niles said:

"It is the rule in bankruptcy as to goods shipped upon consignment, that where there is a clear and unequivocal contract of consignment between the seller and the purchaser the goods will be returned

to the seller upon institution of reclamation proceedings, but all the essential elements of a contract of agency must unite before the goods can be successfully reclaimed by the seller. *All goods must be at all times subject to the control and direction of the seller;* he must control the selling price of the goods and the manner in which such goods shall be sold; nothing is left to the purchaser as to the price he is to obtain upon a resale. There must be a strict accounting between the seller and purchaser at the periods called for in the contract of agency, such accounting to give the names of the purchasers, the amount obtained for the goods, the number of vehicles sold, information as to whether the sale was a cash one or for a promissory note. If there be promissory notes or accounts in payment of the goods, such notes and accounts must be either forwarded to the seller or accounted for by the purchaser and held by him subject to the orders of the seller, to be forwarded to him upon demand.

"All of these elements must unite to make such a contract of consignment as that the goods will be returned to the seller in reclamation proceedings. \* \* \* The other rule is that goods sold with a *jus disponendi* by vendee are lost to the vendor, and especially so as to creditors of the latter.

"The two classes of decisions pursue two different paths because of this crucial question.

"The test is whether or not goods are held for resale in the usual course of business. \* \* \* A careful reading of the above cases will show that in each and every one the property, the title to which was retained until paid for, was sold to the purchaser not for the purpose of resale by

such purchaser but to be used by such purchaser in his business, be it that of a sawmill, a dispenser of soda water, the business of a livery stable (hiring out teams and doing draying business and feeding animals for pay) or what not, but not for resale in the usual course of trade.

“In those cases above referred to wherein the sawmill machinery was sold and was the subject of litigation, it will be seen that the property was to be used and was used in the operation of a sawmill business and not to be resold by the purchaser thereof. In those where horses and mules were sold, the purchaser thereof was not engaged in the business of buying and selling mules but in each and every case he purchased the animal for use and not for resale. In the soda fountain case, *supra*, the fountains were sold to the purchaser not for resale by him, but for the purpose of dispensing soda water therefrom to customers. In the Fairbanks case, *supra*, the Freeman Service Company was engaged in the plumbing business and used the gasoline engine in controversy in conducting that business. They were not engaged in the business of selling gasoline engines, but in the plumbing business, and the engine was a necessary implement to the proper conduct of their business.

“Now, having shown that in each of the above cases the purchasers of the properties were not engaged in the business of buying and selling such properties, but that they were bought for use as a fixture, so to speak, or a necessary incident to their business and not for resale, let us now take up this case where personal property was sold with title retained before the property was sold

to the purchaser for the purpose of resale by him."

The case of *In re* Mann is an unreported case decided by District Judge Dooling in San Francisco a few months ago. The referee ruled that the goods should be returned to the consignor, but Judge Dooling overruled the referee and held that the title passed to the trustee in bankruptcy. The facts are very similar to those in National H. & H. Supply Co., 226 Fed. 840, and show that Judge Dooling did not consider it as establishing a safe rule to follow.

It will thus appear that the trend of the decisions sets very strongly in the direction of denying reclamation petitions for goods consigned for resale, and that such petitions will be denied unless it appears, first, that the consigned goods are segregated and not mixed with the other goods of the consignee; second, that the consignor controls the price and terms upon which the goods are to be sold; third, that the goods are sold upon the account of the consignor and not upon the account of the consignee,—and fourth, that the title to the proceeds, whether in cash, accounts or bills receivable, remains with the consignor until payment is finally made.

Applying this test to the 1911 contract and the actions of the parties under it, it will be seen, as heretofore stated, that none of these conditions were complied with. First, the goods were not segregated; second, they were sold by Newerf, or reconsigned by him to such parties and upon such terms and at such prices as he saw fit, without any interference or con-

trol of The Miller Rubber Company; and, third, the proceeds of the sale belonged to him absolutely and did not in anywise belong to The Miller Rubber Company, but arrangements were made in the contract and actually carried out in the conduct of the business, for the giving of four-months' notes up to twenty-five thousand dollars (\$25,000.00) in payment of goods sold.

Such a state of affairs is not countenanced by the bankruptcy courts.

In view of the importance of limiting the possibilities for fraud in business transactions, it is urged that courts should lay down very plain rules regulating consignments; and should discountenance any attempt to use "consignment" or agency," as they were attempted to be used under the 1911 contract, simply as a sheltering rock in the time of financial storm.

### **Two Corporations.**

The contention is made on behalf of the appellants that The Miller Rubber Company and The Miller Rubber Company of California are one and the same corporation. This contention, to our mind, is absurd, and yet, inasmuch as the point is urged by appellants, we desire to call the court's attention to certain facts with regard to these corporations.

First: The Miller Rubber Company of Ohio is an Ohio corporation, whereas The Miller Rubber Company of California is a California corporation.

Second: The Miller Rubber Company of Ohio is a manufacturing concern, whereas The Miller Rubber Company of California is a selling concern.

Third: The officers of the two corporations are not identical.

Fourth: Appellants themselves considered, so long as it was convenient, that they were separate, and contracted with W. D. Newerf as separate corporations. This is evidenced by the two contracts of 1911 and 1914. In the report of the special master, on page 63 of the Transcript [fols. 58 and 59], the following finding appears:

"I find that The Miller Rubber Company of California is a corporation duly organized and existing under the laws of the state of California, with its principal office at San Francisco, in the state of California, and also having an office at Akron, in the state of Ohio. The Miller Rubber Company of ~~Ohio~~, last mentioned, was organized for the purpose of acting as the agent in handling and selling the goods of The Miller Rubber Company of Ohio and to enable The Miller Rubber Company of Ohio to have a representative in the state of California, thereby saving The Miller Rubber Company of Ohio from filing a certificate and paying a license tax and being licensed to do business in the state of California. It was also organized to protect the name of The Miller Rubber Company in California and to prevent, so far as possible, trade competition therewith. This is a distinct corporation from The Miller Rubber Company of Ohio, and while it does appear from the evidence that the officers of the two corporations are the same, and it is owned and controlled by the stockholders of The Miller Rubber Company of Ohio, nevertheless The Miller Rubber Company of California is a distinct entity and

*calif*

must in all respects be treated as such in its dealings with the bankrupt."

As a matter of fact, the officers of the two corporations are not identical. The Miller Rubber Company of California has five directors, and two of those are located in California and are not identical with the officers of The Miller Rubber Company of Ohio. [Fol. 34, p. 38.] In other words, The Miller Rubber Company of Ohio, not wishing to comply with the laws of the state of California relative to foreign corporations doing business in this state and paying the necessary fees, and to prevent another Miller Rubber Company from being organized in California, caused The Miller Rubber Company of California to be organized [fol. 33, p. 37]. If they wish to accept the benefits of having two corporations, they certainly must not complain if they are called upon to bear the burdens of two organizations.

#### **Termination of Contract.**

Appellant also contends that the contract of 1911 was terminated by the contract of 1914, and quotes the following from the contract of 1914 [Tr. p. 104, fols. 90 and 91]:

"This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existing between The Miller Rubber Company or The Miller Rubber Company of California and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be and are considered null and void except as to the unpaid accounts."

This contract was signed by The Miller Rubber Company of California and W. D. Newerf. The Miller Rubber Company of Ohio was not a party to it; so that it has absolutely no bearing on the contract of 1911. Furthermore, even if the contract of 1911 were terminated by the contract of 1914, such termination would not alter the status of the goods shipped under the 1911 contract and on hand at the time of the filing of the petition in bankruptcy.

The status of these goods is to be determined by an interpretation of the contract under which they were shipped, and the actions of the parties to that contract, so that, so far as these goods are concerned, it is immaterial whether or not the contract was terminated,—the result is the same.

We earnestly submit that the final judgment of the District Court of the United States, in and for the Southern District of California, Southern Division, in affirming the report of the special master, denying the petition of The Miller Rubber Company, and The Miller Rubber Company of California, for the return of the goods on hand under the 1911 contract, should be affirmed.

We also urge that the commissions, amounting to \$4495.25, should be held to be owing to the Newerf estate from The Miller Rubber Company of California; and that judgment should go accordingly.

Respectfully submitted,

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